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In The

Supreme Court of the United States

October Term, 1995

INDEPENDENT CHARITIES OF AMERICA, INC., *et al.*,

Petitioners,

vs.

STATE OF MINNESOTA, WAYNE SIMONEAU, in his capacity as Minnesota Commissioner of Employee Relations,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the market participant exception to the dormant Commerce Clause apply when the State is neither a seller nor a purchaser in the relevant market?

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STATEMENT OF JURISDICTION

The Court of Appeals rendered its decision on April 29, 1996. Petitioners' petition for rehearing was denied June 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States ," and Article VI provides that "This Constitution . . . shall be the supreme Law of the Land."

At issue are the "local presence" requirements of Minn. Stat. § 309.501, the pertinent portions of which are set forth below.

> § 309.501 Subdivision 1(b). "Registered combined charitable organization" means a federated funding organization:
>
> > (4) which is governed by a local, independent, voluntary board of directors which represents the broad interests of the public and 90 percent of the directors of the governing board live

> or work in the community or surrounding area . . .;
>
> (6) which distributes at least 70 percent of its total campaign income and revenue to affiliated agencies and designated agencies that are incorporated in Minnesota or headquartered in the service are in which the state employee combined charitable campaign takes place . . .;
>
> (8) and each designated or affiliated agency supported by the recipient institution with funds contributed by state employees through the combined charitable campaign provides all or substantially all of its health, welfare, social or other human services, in the community and surrounding area in which the state employee combined charitable campaign takes place.

STATEMENT OF THE CASE

The Minnesota State Employee Combined Charitable Campaign ("Campaign") is an annual charitable fund raising drive conducted in the state workplace during working hours. Charitable contributions solicited from state employees are made through payroll deduction. The participants in the Campaign are Registered Combined Charitable Organizations (RCCOs or federations); each federation represents at least fourteen individual charitable organizations. The federation makes application to the Campaign on behalf of its member charities.

The Campaign is conducted pursuant to Minn. Stat. § 309.501, enacted in 1983. In 1993, the Minnesota Legislature amended Minn. Stat. § 309.501 to provide extensive criteria for participation in the Campaign by federations and their individual member charities. 1993 Minn. Laws, ch. 192, sec. 86, § 309.501 subd. 1.

A local presence requirement for participating federations was established. It provides, in relevant part, that qualifying federations must be "governed by a local, independent, voluntary board of directors which represents the broad interests of the public and 90 percent of the directors of the governing board live or work in the community or surrounding area." 1993 Minn. Laws, ch. 192, sec. 86, § 309.501 subd. 1(b)(4). Petitioners are national federated charitable fund raising organizations. As national federations with principal offices located outside the State of Minnesota, petitioners do not have local governing boards. They have therefore been excluded from the Campaign.

The amendment also established a local presence requirement for the federations' member charities (affiliated agencies). 1993 Minn. Laws, ch. 192, sec. 86, § 309.501 subd. 1(b)(6) requires, in part, that affiliated agencies must be "incorporated in Minnesota or headquartered in the service area in which the state employee combined charitable campaign takes place." This results in some of petitioners' affiliated agencies being unable to participate in current and future Campaigns.

Finally, the amendments contain a local spending requirement such that:

> each designated or affiliated agency supported by the recipient institution with funds contributed by state employees through the combined charitable campaign

> provides all or substantially all of its health, welfare, social, or other human services, in *the community and surrounding area in* which the state employee combined charitable campaign takes place.

1993 Minn. Laws, ch. 192, sec. 86, § 309.501 subd. 1(b)(8). Some of petitioners' affiliated agencies also run afoul of this requirement.

Petitioners are federated fund raisers who solicit contributions on behalf of a slate of member charities. Petitioners are incorporated outside of Minnesota and solicit contributions in numerous state and municipal public employee campaigns throughout the United States. All of the petitioners participated in the 1992-1993 and 1993-1994 Campaigns, as they qualified as federations within the meaning of Minn. Stat. § 309.501 prior to its 1993 amendment, and passed all attendant scrutiny. Petitioners' applications to the 1994-1995 Campaign were rejected due to noncompliance with the aforementioned local presence and local spending requirements. Some of petitioners' affiliated charities that were disqualified from the Campaign include Make-A-Wish Foundation of America, "Just Say No" International, Multiple Sclerosis Association of America, Izaak Walton League of America, Sierra Club Foundation, Feed The Children, Operation Smile International, and the National Ataxia Foundation.[1] The only barriers to petitioners' participation in the 1994-1995 Campaign were the local presence and local spending requirements adopted by the legislature in 1993.

On June 2, 1994, petitioners commenced action to challenge

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1. A complete listing of the 88 affiliated charities for which application was made by petitioners to the 1994-1995 Campaign is found at App. 37a.

the constitutionality of amendments made to Minn. Stat. § 309.501 during the 1993 and 1994 legislative sessions.[2] Adversely impacted in similar fashion by this legislation, petitioners joined in bringing the underlying action pursuant to Fed. R. Civ. P. 20(a).

On July 29, 1994, Magistrate Judge Franklin L. Noel issued a recommendation to deny petitioners' motion for preliminary injunction, which motion had sought relief allowing petitioners continued participation in the Campaign pending final resolution of the claims presented in this case. On November 30, 1994, the District Court, Hon. James R. Rosenbaum presiding, adopted the Recommendation of the Magistrate Judge. On subsequent cross-motions for summary judgment, the District Court ordered judgment in favor of the State of Minnesota and the Commissioner of Employee Relations.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed, holding that the challenged legislation did not violate petitioners 1st Amendment rights, rights to due process or equal protection, and did not violate the Commerce Clause. The Eighth Circuit held that the State is exempt from Commerce Clause scrutiny because it is acting as a market participant in the charitable fund raising market, even though it is not a purchaser or seller in that market. 82 F.3d at 799. (App. 20a-22a). This petition for certiorari seeks review only as to the Eighth Circuit's determination that the discriminatory legislation does not violate the Commerce Clause.

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2. Petitioners do not seek review of the 1994 amendments, which were provisions enabling other fund raisers, excluded by the 1993 amendments, to regain eligibility.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's holding that the State of Minnesota is a market participant (exempt from Commerce Clause scrutiny), even though it is not acting as a purchaser or a seller, is a significant expansion of the market participant exception to the dormant Commerce Clause. Absent being a purchaser or a seller, petitioners submit the State's involvement is insufficient to bring it within the market participant exemption. This Court has noted that "in this kind of case there is 'a single inquiry: whether the challenged 'program constituted *direct* state participation in the market.' ' " *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1982) (*White*) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 436, n.7 (1980)) (*Reeves*) (emphasis added). By holding that a state can be a participant, though the state is acting neither as a purchaser nor as a seller, the Eighth Circuit's decision would clearly appear to conflict with this Court's earlier decisions requiring direct participation in the market. The limits of the market participation exception are therefore expanded if the Eighth Circuit's decision is allowed to stand.

The impact of this case is widespread. This case directly affects all state and municipal charitable campaigns conducted in the public workplace. Because parochial favoritism has obvious appeal to state and local political subdivisions, legislation similar to that at issue here is virtually certain to follow in other jurisdictions. In fact, this Court has granted certiorari where the State of Maine enacted legislation designed to direct the flow of tax benefits to non-profit institutions conducted principally for Maine residents (and excluded from benefit non-profits whose operations are not directed toward Maine residents). *See Camps Newfound/Owatonna v. Town of Harrison*, No. 94-1988, *cert. granted*, 116 S. Ct. 1040 (Mar. 4, 1996), opinion below, 655 A.2d 876 (Me. 1995) (*Camps*

Newfound). Unlike *Camps Newfound*, where the State is arguably attempting to subsidize charitable causes within the State, this case involves the State's redirecting the flow of commerce by regulating which causes are eligible to participate and seek funds from state employees. There is absolutely no element of state funding or subsidy present in this case. This lack of state funding differentiates this case from other market participant cases which have come before the Court, and is what here makes the State a regulator as opposed to a participant.

The Eighth Circuit's market participant holding further appears to create a conflict between federal circuit courts. Petitioners maintain the present facts are dynamically analogous to those in *Smith v. Department of Agriculture of the State of Georgia*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981) (*Smith*), where the State was determined to be the *provider of the marketplace* and not a participant.

Petitioners submit the Eighth Circuit's holding on the Commerce Clause issue is (1) in conflict with United States Supreme Court precedent; (2) likely to have widespread impact; and (3) in conflict with the Fifth Circuit's decision in *Smith*. For these reasons, petitioners believe this Court should grant certiorari.

I.

DOES THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE APPLY WHEN THE STATE IS NEITHER A SELLER NOR A PURCHASER IN THE RELEVANT MARKET?

The market participant exception to the dormant Commerce Clause was first embraced by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (*Alexandria Scrap*). In

Alexandria Scrap this Court approved a Maryland program to pay a bounty for every Maryland-titled junk car converted into scrap, despite a 1974 amendment which imposed more onerous documentation standards on out-of-state than in-state processors. The Court held that *Alexandria Scrap* did not involve "the kind of action with which the Commerce Clause is concerned," *id.* at 805, and explained that the state itself had entered "into the market as a purchaser, in effect, of a potential article of interstate commerce . . ." *id.* at 808. As a purchaser, the State of Maryland was found to be exempt from Commerce Clause dictates.

Three subsequent decisions of this Court have helped establish the boundaries of the market participant exception. In *Reeves*, 447 U.S. 429 (1980), this Court held that the State of South Dakota could confine the sale of cement which it produces at a state-owned plant solely to residents of the state during a time of cement shortage. South Dakota, as a seller, was held to be exempt from Commerce Clause application.

In *White*, 460 U.S. 204 (1983), this Court permitted the City of Boston to condition eligibility for award of public construction contracts on a firm having a work force made up of at least one-half Boston residents. In *White*, the Court found that the City was acting as a market participant only as to those contracts being directly backed by city funds; the City was considered to be a purchaser. Significantly, where federal funds were used, and the City was not the effective purchaser, the Court's holding rested upon a different rationale. *Id.* at 214- 15. The clear implication of the Court's having used a different rationale for the federally funded contracts is that the City must be the purchaser to avail itself of the market participant exemption.

In *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82(1984) (*Wunnicke*), Alaska required that timber purchased

from state forests must be processed in the State, prior to export. Although the State was acting as a seller and was therefore a market participant, the Court rejected application of the doctrine because the State was also imposing regulations downstream in the timber-processing market. *Id.* at 95. The Court explained that

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further .... The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

Id. at 97.

By distinguishing between a state's acting as a market participant as opposed to a regulator, this Court has shielded from Commerce Clause attack blatant favoritism of local interests when a state or municipality purchases car hulks, sells cement/timber or hires (purchases) workers. While not having been stated expressly, these four decisions require that the state be either a purchaser or a seller to qualify for the market participant exemption.[3] The Eighth Circuit's decision below thus

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3. Even if Chief Justice Rehnquist's dissent in *Wunnicke* had prevailed as the opinion of the Court, that opinion would not support application of the market participant exception to this case. Essentially, that opinion contends that if the state can constitutionally enter the market in a different capacity, but still as a purchaser or a seller in a related market, and can in that capacity impose the same conditions on parties with whom it wouldddeal as a purchaser or a seller, then the modality by which the state chooses to participate should not be a bar. *Wunnicke*, 467 U.S. 82, 103 (Rehnquist, J. dissenting). This analysis would not apply the market participant exception to the present case, as the labor market is not related to the charitable fund raising market.

stands alone in extending the market participant exception where the state is neither a purchaser nor a seller.

Petitioners maintain this case is dynamically analogous to *Smith v. Department of Agriculture of the State of Georgia*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). In *Smith*, the State was determined to be the *provider of the marketplace* and not a participant. *Smith* involves a Georgia Department of Agriculture regulation whereby non-Georgia produce sellers were assigned to inferior sales locations at the state-owned farmers market. The Court, in *Smith*, reasoned:

> Georgia's role at the Columbus Farmers Market can only be described as a hybrid one. Admittedly, the market is owned, operated and partially financed by the State of Georgia. On the other hand, it is significant that petitioners neither produce the goods to be sold at the market, nor engage in the actual buying or selling of those goods. In essence, the State of Georgia has simply provided a suitable marketplace for the buying and selling of privately owned goods ... Accordingly, the State of Georgia cannot be deemed an actual market participant at the Columbus Farmers Market. Rather, its essential role is that of market regulator. As such, petitioners' rules and regulations governing the operation of the Columbus Farmers Market are subject to scrutiny under the Commerce Clause.

Id. at 1083.

Petitioners assert that by conducting this Campaign, the

State has merely provided the marketplace. In that marketplace, state employees purchase, and federations sell, charitable services. Rather than acting as a market participant, the State here has simply created a new marketplace (the Campaign), diverted commerce into this new marketplace, and, having accomplished this diversion, now seeks to *regulate* who is eligible to participate.

To assign the State a greater role than "marketplace provider" is not only inaccurate, but opens the floodgates and allows states to discriminate in markets where the state is only peripherally involved. As the Court recognized in *Wunnicke*, 467 U.S. 82 (1984), "Unless the 'market' is relatively narrowly defined, the [market participant] doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *Id.* at 97-8. At the heart of the dispute in that case was a disagreement over the definition of the market. The dispute in this case is the *definition of a market participant*. Petitioners assert the failure to narrowly define a "market participant" poses the same threat to the Commerce Clause that the Court recognized in *Wunnicke*. The definition of a market participant should therefore be limited to situations where the state is directly participating in the market as either a purchaser or a seller.

In Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989), the author compares the Fifth Circuit's decision in *Smith* to this Court's Commerce Clause rulings in cases involving state laws limiting access to state roads.[4] *Id.* at 450-51. According to

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4. The cases referred to by Professor Coenen are *Kassel v. Consolidated Freightways, Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925). 88 MICH.L.REV. at 450, n.328.

Professor Coenen, "Roads are the arteries of the national market . . . The message of the cases is that states, as a rule, may not ignore the dormant Commerce Clause in deciding who gains access to the infrastructure of interstate trade." *Id.* at 450.

Professor Coenen further states that "this [road analogy] line of reasoning best explains the result in [the *Smith* case] . . . [T]he farmers' market resembled state roads. The market was more than an ordinary commercial building. It was an artery of commerce, developed by the state for the very purpose of facilitating private purchases and sales and through which — due to its very existence — such trading had been channeled. To limit access to this infrastructure . . . was akin to limiting access to state roads." *Id.* at 451.

Another similarity the present case shares with *Smith* is the presence of multiple markets. In *Smith* there was the space leasing market and the produce sales market. The *Smith* court determined that the produce sales market was the relevant market. *Smith*, 630 F.2d at 1083, and at 1086 (Gee, J., concurring). The present case involves the labor market (as the State shares an employment relationship with its employees) and the charitable fund raising market. The Eighth Circuit has correctly determined that the charitable fund raising market is the relevant market,[5] but found the State to be a participant in both the labor and charitable fund raising markets. *Independent Charities of America v. Minnesota*, 82 F.3d 791, 799 (8th Cir. 1996) (*Independent Charities*) (App. 19a-20a). Certainly, Minnesota is no more a participant in the charitable fund raising market than is Georgia in the produce sales market.

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5. While not specifically addressed in the opinion, the Eighth Circuit's determination of the relevant market is clearly correct. This determination is supported by an analogous determination of the "relevant forum" in *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800-801 (1985).

In his dissent in *White*, Justice Blackmun noted,

> The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.

460 U.S. 204, 218 (Blackmun, J., dissenting).

The remarks of Justice Blackmun in *White* are appropriately directed to the present case, as this case, more than *White*, clearly presents a government's attempt "to dictate to another those with whom *he* may deal." *Id.* at 219. The essence of the transaction at issue here, charitable donations, involves the purchasing of charitable services by state employees (in their personal/ nongovernmental capacities) from the federations. (In effect, the State has told its employees that *their* charity is to begin at home and end at home). The challenged legislation is clearly an attempt to impede trade among these private parties and is regulatory in nature, not participatory. Participation entails state funding. Here, there is none.

While it is abundantly clear that the State is not a purchaser or a seller in the relevant (charitable fund raising) market, the Eighth Circuit nonetheless holds that Minnesota is somehow a participant in that market. The Eighth Circuit's decision in this case is hinged upon the State's acting as an employer, and the court of appeals cites to *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 216, n.4 (1st Cir. 1994) (*Fireside*), "for the proposition that the 'market participant' exception applies not only when a State

enters the market as a buyer or seller, but also when it acts as an employer to favor local citizens." *Independent Charities* at 799 (App. 19a). Yet, *Fireside* does not in any way involve the State acting as an employer. *Fireside* footnote 4 is in error in asserting that a state is exempt from the Commerce Clause when acting as an employer. There is absolutely no authority to confer any special significance to the obvious and irrelevant fact that the State is acting as an employer. The *Fireside* court's citation in footnote 4 to *Alexandria Scrap* for the proposition that a state is a market participant when "acting as an employer" is simply erroneous. Neither *Alexandria Scrap* nor *Fireside* have facts which remotely involve the state being an employer or acting as an employer. By borrowing this baseless language from *Fireside*, the Eighth Circuit now propagates the distortion.

The only cases where it is at all relevant that the state acts as an employer are those where the issue concerns preferential hiring practices, such as *White*, 460 U.S. 204 (1983) and *International Organization of Masters v. Andrews*, 626 F. Supp. 1271 (D. Alaska 1986), (statute providing for cost-of-living wage differentials between Alaska Marine Highway System Alaska-resident and nonresident employees).[6] The significance in that context is that the state is there acting as a *purchaser* of labor and thereby participating in the labor market, which, in those cases, is the relevant market.

The court of appeals correctly observes that "[the market participant] exception is founded on the notion that when a state enters the open market as a proprietor, rather than as a regulator,

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6. *See also, United Building and Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) (where appellant abandoned its Commerce Clause challenge to the Camden ordinance requiring at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents in light of this Court's decision in *White*). *Id.* at 213.

there is less danger that the state's activity will interfere with Congress's plenary power to regulate the market." *Independent Charities* at 799 (App. 20a), citing to *Reeves*, 447 U.S. at 437-39. Unfortunately, the Eighth Circuit confuses the State's being a proprietor in the labor market with its role in the charitable fund raising market. Clearly, the State has not here entered the charitable fund raising market as a proprietor. The Eighth Circuit's reasoning is therefore flawed.

The Eighth Circuit decision would seem to reflect a desire to limit access to the state workplace, premised on the need to minimize "workplace disruption and administrative difficulties related to the Campaign." *Independent Charities* at 796 (App. 15a). But such a focus ignores the significance of interstate commerce having been channeled into the state workplace. Moreover, the State has available a means of addressing such workplace concerns without discriminating against interstate commerce.[7] The number of federations participating in the Campaign can be controlled using criteria which are not based upon local presence or local spending. *See Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985). Under dormant Commerce Clause analysis (applicable when the state is not exempt as a market participant), facially discriminatory laws are invalid unless the state demonstrates both that the statute (1) serves a legitimate local purpose, and (2) that this purpose could not be served adequately by available non-discriminatory means. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334,

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7. The St. Paul Public School System has a similar campaign for its employees with an eligibility requirement that participating RCCOs garner the support of at least 5% of employees contributing in the previous campaign. Failure to attain this level of support results in a 1 year disqualification of the RCCO. (App. 35a-36a). Such a non-discriminatory measure could clearly be used to address the proffered concerns the State claims to have served as the legislature's intent in enacting the challenged legislation.

342-43 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). The challenged statute does not survive such scrutiny.

The direct impact on interstate commerce here is patent. Workplace concerns, though perhaps real, are capable of being addressed through non-discriminatory means. The Eighth Circuit did not need to extend the market participant exemption to accommodate this factually inapplicable case.

II.

THE COURT SHOULD DELAY ANY DETERMINATION OF THIS PETITION UNTIL A DECISION IS RENDERED IN *CAMPS NEWFOUND/ OWATONNA v. TOWN OF HARRISON*.

For the foregoing reasons, this Court should grant the petition and set the case for plenary consideration. Should the Court not do so, the petition should nevertheless be held pending this Court's disposition of *Camps Newfound/Owatonna v. Town of Harrison*, No. 94-1988, *cert. granted*, 116 S. Ct. 1040 (Mar. 4, 1996), opinion below, 655 A.2d 876 (Me. 1995).

In that case, the appellants are challenging a Maine tax-exemption allowed only to non-profits serving primarily Maine residents. The Town of Harrison, as respondent, is claiming exemption from the dormant Commerce Clause as a market participant. *Camps Newfound*, No. 941988, Respondent's Brief, 34-41. Resolution of the market participant issue in *Camps Newfound* could directly control the appropriate disposition of this case. If Maine is determined not to be a market participant, even though state funding is present, then it would seem to follow *a fortiori* that Minnesota is not a participant in the charitable fund raising market, as it does not here financially participate.

Even if the Court is not presently inclined to grant this petition, we submit it should refrain from an immediate determination. Postponement until decision of *Camps Newfound* will permit the Court, if appropriate, to subsequently grant this petition, vacate the judgment, and remand accordingly.

CONCLUSION

The State is neither a purchaser nor a seller in the charitable fund raising market. The State has not entered the charitable fund raising market as a proprietor. The kind of "direct" participation contemplated by the Court in *Reeves* and *White* is absent here. The State has simply channeled commerce through the artery of the state workplace, and having accomplished this diversion, is now regulating the market in violation of the dormant Commerce Clause. The State has ample ability to manage participation in the Campaign without having to discriminate on the basis of locality.The decision below provides dangerous impetus for enactment of similar discriminatory legislation and should therefore be promptly addressed to avoid such mischief. Review should be granted, with summary reversal an appropriate disposition.

Dated: September 9, 1996

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JUNE 11, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No.: 95-1107MNMI

Independent Charities of America, etc., et al,

Appellants,

v.

State of Minnesota, et al,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 11, 1996

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED APRIL 29, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No.: 95-1107MNMI

Independent Charities of America. Inc,; Local Independent Charities Inc.; National United Service Agencies, Inc.; Environmental Federation of America, doing business as Earth Share,

Appellants,

v.

State of Minnesota, Wayne Simoneau, in his capacity as Minnesota Commissioner of Employee Relations,

Appellees.

Appeal from the United States District Court
or the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

Appendix B

April 29, 1996

A true copy.

ATTEST: s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 29, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1107

Independent Charities of America, Inc.; Local Independent Charities, Inc.; National United Service Agencies, Inc.; Environmental Federation of America, doing business as Earth Share,

Appellants,

v.

State of Minnesota, Wayne, Simoneau, in his capacity as Minnesota Commissioner of Employee Relations,

Appellees.

Submitted: October 20, 1995

Filed: April 29, 1996

Appeal from the United States District Court for the District of Minnesota

Before McMILLIAN, ROSS and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appendix C

Independent Charities of America, Inc., Local Independent Charities, Inc., National United Service Agencies, Inc., and Environmental Federation of America, Inc., d/b/a Earth Share (collectively plaintiffs) appeal from a final order entered in the United States District Court[1] for the District of Minnesota granting summary judgment in favor of the State of Minnesota and Linda Barton, in her capacity as Minnesota Commissioner of Employee Relations (collectively the State defendants) on plaintiffs' claims that certain statutory amendments limiting access to the Minnesota Employee Combined Charitable Campaign (Campaign) violate the First Amendment, federal equal protection and substantive due process, and the Commerce Clause. *Independent Charities of America, Inc. v. Minnesota*, No. 4-94-CV-483 (D. Minn. Dec. 16, 1994). For reversal, plaintiffs argue that the district court erred in holding that (1) the exclusion of non-local fundraisers from the Campaign did not violate plaintiffs' First Amendment right to free speech; (2) the exclusion of non-local fundraisers from the Campaign did not violate their rights to equal protection and due process; and (3) the State of Minnesota was a "market participant" so as to exempt the challenged amendments from scrutiny under the Commerce Clause. For the reasons discussed below, we affirm the order of the district court.

I. Background

The Campaign is an annual fund raising drive whereby a state employee may elect to have a contribution deducted from his or her paycheck and paid to a registered combined charitable organization. *See* Minn. Stat. § 309.501(1)(e) (1994). The

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1. The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

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Campaign is conducted in the state workplace during working hours. According to Minn. Stat. § 309.501(3), only charitable federations which have been recognized by the Campaign as Registered Combined Charitable organizations (RCCOs) are eligible to participate in the Campaign. A charitable federation seeking to participate in the Campaign on behalf of its member charities must meet the statutory criteria for RCCOs set forth in Minn Stat. § 309.501(1).[2]

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2. Before the 1993 and 1994 amendments at issue in the present case, § 309.501(1) provided in pertinent part:

> *Subdivision 1. Definitions.*
>
> "Registered combined charitable organization" means an organization
>
> (1) which is tax exempt under Section 501(c)(3) of the Internal Revenue Code . . . and to which contributions are deductible under Section 170 of the Internal Revenue Code;
>
> (2) which secures funds for distribution to ten or more charitable agencies in a single, annual consolidated effort;
>
> (3) which is governed by a voluntary board of director which represents the broad interests of the public;
>
> (4) which distributes at least 70 percent of its total campaign income and revenue to the designated agencies it supports and expends no more than 30 percent of its total income and revenue for management and general costs and fund raising costs;

(Cont'd)

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In 1993, the Minnesota Legislature amended § 309.501 to provide more restrictive criteria for participation in the Campaign by RCCOs and their individual member charities. These amendments rendered plaintiffs ineligible for participation in the 1994-95 Campaign.[3] Three aspects of the 1993 amendments are challenged by plaintiffs. First, the Legislature amended Minn. Stat. § 309.501(1) to require participating RCCOs to be "governed by a local, independent, voluntary board of directors which represents the broad interests of the public and 90 percent of the directors of the governing board live or work in the community or surrounding area." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767; Jt. App. 71. Because plaintiffs did not have local boards of directors, they did not qualify as RCCOs under the 1993 amendments. Second,

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(Cont'd)

> (5) and each designated agency supported by the recipient institution devotes substantially all of its activities directly to providing health, welfare, social, or other human services to individuals;
>
> (6) and each designated agency supported by the recipient institution provides health, welfare, social, or other human services, in the community and surrounding area in which the recipient institution's fund drive takes place; and
>
> (7) which has been registered with the commissioner of commerce in accordance with this section.

Minn. Stat. § 309.501(1) (1992).

3. The Legislature provided a compliance waiver of one year for those RCCOs which could not meet the more stringent criteria if they had participated in the 1992-93 Campaign.

the Legislature established a local presence requirement for the RCCOs' member charities. As amended in 1993, § 309.501(1)(b)(6) required that individual member charities, or "affiliated agencies,"[4] be "incorporated in Minnesota or headquartered in the service area in which the state employee combined charitable campaign takes place." *Id.* As a result of this provision, some affiliated agencies became unable to participate in the 1994-95 Campaign. Finally, the Legislature added a local spending requirement to § 309.501(1) , requiring that each affiliated agency must provide "all or substantially all of its health, welfare, social, or other human services, in the community and surrounding area in which the state employee combined charitable campaign takes place." *Id.* Some of plaintiffs' affiliated agencies were excluded from the Campaign under this requirement.

In 1994, the Legislature again amended Minn. Stat. § 309.501. First, it amended section (1)(b)(4) to establish an alternative to the 1993 requirement that a RCCO had to be governed by a local board of directors. The 1994 amendment provided that "if the charitable agencies are solely educational institutions which meet the requirements of paragraph (c), [a RCCO may be governed] by a national board of directors that has a local advisory board composed of members who live or work in the community or surrounding area." Act of Apr. 28, 1994, ch. 535, § 1, 1994 Minn. Laws 769, 770; Jt. App. B30, 31. Second, the Legislature added a provision to Minn. Stat. § 309.501(1)(b) stating that "[r]egistered combined charitable organization"

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4. Minn. Stat. § 309.501(1)(c) defines an "affiliated agency" as "a charitable agency that is represented by a federation and has an ongoing relationship with that federation which involves a review and monitoring process to ensure financial, managerial, and programmatic responsibility." Minn. Stat. § 309.501(1)(c) (1994).

includes a charitable organization organized by Minnesota state employees and their exclusive representatives for the purpose of providing grants to nonprofit agencies providing Minnesota residents with food or shelter if the charitable organization meets the requirements of clauses (1), (4), and (5)." *Id.*

The 1993 amendments had the practical effect of excluding from participation in the 1994-95 Campaign six organizations which had previously qualified as RCCOs, including the United Negro College Fund (UNCF), Open Your Heart to the Hungry and Homeless (OYH)[5], and plaintiffs. Under the 1994 amendments, UNCF and OYH became eligible once again to participate in the Campaign.

Plaintiffs, four federated charities who solicit contributions on behalf of a slate of individual member charities, are incorporated outside of Minnesota and solicit contributions in state and municipal public employee campaigns throughout the United States. Plaintiffs' applications to the 1994-95 Campaign were rejected due to non-compliance with the statutory eligibility requirements. On June 22, 1994, plaintiffs instituted the present action in the United States District Court for the District of Minnesota, challenging the constitutionality of the 1993 and 1994 amendments to Minn. Stat. § 309.501. The amended complaint alleged that the challenged amendments violate the First Amendment, federal equal protection and substantive due process, and the Commerce Clause. Plaintiffs sought a declaratory judgment and a permanent injunction against application of the 1993 and 1994 amendments. In

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5. Open Your Heart to the Hungry and Homeless, a charitable organization created by Minnesota state employees, provides direct benefits to charities which give food and shelter to indigent Minnesota residents.

addition, after filing their complaint, plaintiffs moved for a preliminary injunction allowing their participation in the 1994-95 Campaign pending final resolution of the present case. On July 29, 1994, the magistrate judge issued a Report and Recommendation that plaintiffs' motion for a preliminary injunction be denied. The district court, adopting the magistrate judge's Report and Recommendation, denied the preliminary injunction. On subsequent cross-motions for summary judgment, the district court granted summary judgment in favor of the State defendants. This timely appeal followed.

II. Discussion

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Insurance Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal, rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

A. First Amendment Challenge

We begin by addressing plaintiffs' argument that the 1993 statutory amendments restricting the eligibility criteria for participation in the Campaign violate their First Amendment

right to freedom of speech. The Supreme Court has recognized since *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (*Schaumburg*), that charitable solicitations "are so intertwined with speech that they are entitled to the protections of the First Amendment." *See id.* at 632 (municipal ordinance prohibiting public solicitation of contributions by charitable organizations which did not use at least seventy-five percent of its receipts for "charitable purposes" was unconstitutionally overbroad under the First Amendment); *see also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984) (*Munson*) (Maryland statute prohibiting charitable organizations, in connection with any fund raising activity, from paying expenses of more than twenty-five percent of the amount raised was unconstitutional limitation on protected First Amendment solicitation activity).

Schaumburg and *Munson*, however, involved regulations affecting door-to-door or on-street solicitation. In *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797-99 (1985) (*Cornelius*), the Supreme Court recognized a constitutionally significant distinction between such public forms of charitable solicitation and the type involved in a fund raising drive conducted in the government workplace. *See id.* at 798-99. At issue in *Cornelius* was the exclusion of legal defense and political advocacy organizations from the Combined Federal Campaign (CFC), an annual charitable fund raising drive conducted in the federal workplace during working hours. *See id.* at 797-811. The government had limited participation in the CFC to health and welfare charities providing direct assistance to individuals, in contrast to nonprofit organizations engaged in lobbying or public interest litigation. After determining that the charitable solicitations in the CFC (consisting primarily of 30-word statements by participating

charities) in a campaign pamphlet were protected speech, the Court concluded that the speech did not occur in either a traditional public forum or a limited public forum. Rather, it found that the CFC was a nonpublic forum, such that the challenged regulations over access need only be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." *See id.* at 806. Applying the "reasonableness" test, the Court upheld the eligibility criteria excluding legal defense and political advocacy groups from the CFC, concluding that the restrictions were viewpoint-neutral and that the federal government might reasonably have concluded that the exclusion of legal defense and political advocacy groups from the CFC would increase federal employees' acceptance of the fund raising drive, limit disruption in the federal workplace, and avoid the appearance of government entanglement with particular viewpoints. *See id.* at 809 ("[T]he President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy."); *see also Pilsen Neighbors Community Council v. Netsch*, 960 F.2d 676, 686 (7th Cir. 1992) (Illinois statute requiring that charities seeking to participate in state employee deduction program obtain signatures of 4,000 employees and disclose on all petitions and payroll deduction cards the percentage of their receipts expended for fund raising and overhead costs was reasonable and did not violate First Amendment protections); *United Black Community Fund, Inc. v. City of St. Louis*, 800 F.2d 758, 760 (8th Cir. 1986) (city's decision to limit access to its payroll deduction program to charities whose administrative and fund raising costs did not exceed twenty-five percent of contributions was reasonable and viewpoint neutral under the *Cornelius* analysis).

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In the present case, plaintiffs concede that the Campaign, like the CFC at issue in *Cornelius*, is a nonpublic forum. Yet they attempt to distinguish the holding of *Cornelius* on the basis that the restrictions on access to the CFC were in furtherance of an end — the provision of food and shelter to the indigent — that was not only reasonable but also laudable. By contrast, they argue, the 1993 amendments to Minn. Stat. § 309.501 "espouse no such worthy or even reasonable objective." Brief for Appellants at 6-7. Thus, they contend that the 1993 amendments violate their First Amendment right to freedom of speech.

In response, the State defendants argue the district court correctly found that the challenged amendments satisfy the "reasonableness" test set forth in *Cornelius* for restrictions on access to a nonpublic forum. The State defendants place great weight on the fact that the Supreme Court clarified in *Cornelius* that easing administrative manageability and reducing workplace disruption are legitimate justifications for restricting access to a nonpublic forum. *See Cornelius*, 473 U.S. at 809-10. The State defendants maintain that the amendments to Minn. Stat. § 309.501 satisfy the "reasonableness" standard, because they were enacted to increase the manageability of the Campaign and to reduce disruption in the State workplace. We agree.

Although the purpose of the 1993 amendments to Minn. Stat. § 309.501 is not articulated in the statute itself, defendant Linda Barton, the state Commissioner of Employee Relations at the time the amendments were enacted, testified before the legislative appropriations conference committee that the goal of the eligibility restrictions was to simplify the Campaign and make it operate more smoothly. *See* Linda Barton Aff. ¶ 9, Jt. App. 68. Thus, to the extent that the 1993 amendments created a local nexus requirement, they were intended to make the

Campaign more appropriate and relevant to the State and its employees. *Id.* The State has a legitimate interest in minimizing workplace disruption and administrative difficulties related to the Campaign. In our view, the 1993 amendments are reasonable because they are wholly consistent with these legitimate interests of the State. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (preferential access to interschool mail system given to union representing teachers of the school district did not violate First Amendment). The State defendants might reasonably have concluded that requiring RCCOs and their affiliated agencies to demonstrate certain local connections would make the Campaign operate more efficiently by limiting the overall number of participating RCCOs and by restricting participation to those charities which provide a substantial benefit to Minnesota residents. In addition, the 1993 amendments are viewpoint-neutral, because there is no suggestion that the criteria for participation in the Campaign are intended to suppress one viewpoint or advance another.

Finally, we note that the Supreme Court in *Cornelius* made clear that a restriction on access to a nonpublic forum does not violate the First Amendment "merely because use of that forum may be the most efficient means of delivering the speaker's message." *See Cornelius*, 473 U.S. at 809. Even if the 1993 amendments preclude plaintiffs from participating in future Campaigns, they still retain ample alternative channels to solicit contributions from State employees — such as direct mail and in-person solicitation outside the workplace — because the amendments place no restrictions on plaintiffs' general ability to solicit donations in the State. Therefore, because the 1993 amendments are both viewpoint-neutral and reasonably related to a legitimate state interest, we hold that they do not violate plaintiffs' First Amendment right to freedom of speech.

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B. Equal Protection and Due Process Challenge

We now turn to plaintiffs' argument that the 1993 and 1994 amendments to Minn. Stat. § 309.501 violate their equal protection and substantive due process rights under the United States Constitution. Plaintiffs maintain that these amendments violate the Equal Protection Clause by creating a local/non-local distinction between charitable federations and affiliated agencies eligible for participation in the Campaign. Although plaintiffs concede that rational basis review should govern their equal protection claim, they contend that neither the 1993 nor the 1994 amendments rationally promote a legitimate State objective. Similarly, they contend that the 1994 amendments run afoul of the Due Process Clause by creating alternatives to certain statutory eligibility criteria which have enabled UNCF and OYH to participate in the 1994-95 Campaign. In effect, plaintiffs argue that the State has violated the Due Process Clause by arbitrarily and capriciously granting UNCF and OYH preferential treatment.

Addressing plaintiffs' federal equal protection claim, the State defendants argue that the district court correctly found that the 1993 and 1994 amendments were rationally related to the State's legitimate objectives in minimizing workplace disruption and increasing the manageability of the Campaign. The State defendants also note that the State was not required to articulate its reasons for creating the current statutory scheme in order to withstand scrutiny under the rational basis test. Similarly, in response to plaintiffs' substantive due process claim, the State defendants maintain that the 1994 amendments were enacted to promote the State's legitimate goal of clarifying the purpose and goals of the Campaign and making it more manageable. Thus, they argue that the 1994 amendments fall

well within the parameters of both federal equal protection and substantive due process. We agree.

Because the 1993 and 1994 amendments to Minn. Stat. § 309.501 do not target or exclude a suspect class, they will withstand scrutiny under the Equal Protection Clause so long as they are rationally related to a legitimate governmental objective. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). Under rational basis review, challenged statutory classifications are accorded a strong presumption of validity, which is overcome only if the party challenging them negates "every conceivable basis which might support it." *Id.* at 2102. In the present case, plaintiffs have failed to make such a showing. As we concluded above, we think the Legislature might rationally have concluded that restricting access to the Campaign to charities meeting the local connection requirements would not only decrease workplace disruption but would also render the Campaign more manageable and relevant to State employees. In sum, plaintiffs' rejected First Amendment claim fares no better when presented in equal protection garb. *See Perry*, 460 U.S. at 54-55 (upholding under rational basis review preferential access given by school district to exclusive bargaining representative of teachers in that district).

Also without merit is plaintiffs' claim that the 1994 amendments to Minn. Stat. § 309.501 violates the Due Process Clause. The Supreme Court made clear in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 446, 470 n.12 (1981), that a statute which satisfies the rational basis test in an equal protection analysis also satisfies the rational basis test under substantive due process analysis. Because we have concluded that the 1994 amendments reasonably promote legitimate State objectives, we hold that the amendments comport with the requirements of the Due Process Clause.

Appendix C

C. Commerce Clause Challenge

Finally, plaintiffs contend that the 1993 amendments to Minn. Stat. § 309.501 violate the dormant Commerce Clause by prohibiting out-of-state federations and non-local affiliated agencies from participating in the Campaign. The district court concluded that the 1993 amendments were exempt from scrutiny under the Commerce Clause because the State was acting as an employer rather than a regulator by defining the charitable organizations which would have access to its workplace for fund raising purposes. Slip op. at 2526 (order from the bench). On appeal, plaintiffs contend that this determination was erroneous, because the State, by enacting the 1993 amendments to Minn. Stat. § 309.501, is regulating the charitable solicitation market. First, we must determine whether the State falls within the "market participant" exception to the dormant Commerce Clause and, if it does not, we must consider whether the 1993 amendments impermissibly burden out-of-state charitable federations seeking to participate in the Campaign.

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (*Wunnicke*); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992) (Oklahoma violated the Commerce Clause in requiring coal-fired electric utilities in the state to burn coal mixture containing at least ten percent Oklahoma-mined coal). This "negative" or "dormant" aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). It is well-settled, however, that the dormant Commerce Clause does not apply to states which are acting as "market participants," rather than as "market regulators." *See, e.g., White v. Massachusetts Council of Construction Employees*, 460 U.S. 204, 214-15 (1983) (*White*) (City of Boston could require firms seeking eligibility for award of public construction contracts to have a work force made up of at least fifty percent of Boston residents); *Reeves, Inc. v. Stake*, 447 U.S. 429, 434-47 (1980) (*Reeves*) (South Dakota could constitutionally confine sale of cement produced at a state-owned plant solely to state residents during cement shortage because the State, as a seller of cement, was exempt from dormant Commerce Clause); *Hughes v. Alexandria Scrap*, 426 U.S. 794, 805 (1976) (*Alexandria Scrap*) (market participant exception applied to Maryland program to pay a bounty for every Maryland-titled junk car converted into scrap, despite imposition of more stringent documentation standards on out-of-state processors, because the program affected the market no differently than if Maryland were a private company bidding up the price of auto scrap). The rationale for the distinction drawn between States acting as market participants and those acting as market regulators is that the Commerce Clause primarily applies to state taxes and regulatory measures interfering with private trade in the national marketplace. *Alexandria Scrap*, 426 U.S. at 807-08. By contrast, there is no indication that the Clause was intended to limit the ability of the States themselves to operate in the free market. *Reeves*, 447 U.S. at 437. In addition, as the Supreme Court explained in *Reeves*, because state proprietary activities are often burdened with the same restrictions imposed on private market participants, "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439.

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In the present case, plaintiffs acknowledge that the State acts as an employer, and therefore participates in the labor market, by hiring employees. Yet they maintain that the relevant market in this case is the charitable fund raising market, which exists independently of the labor market. Plaintiffs argue that by enacting the 1993 amendments to Minn. Stat. § 309.501, the State is regulating the charitable fund raising market and that the real participants in this market are state employees, acting as "buyers" of charitable services, and charitable federations, acting as "sellers" of such services. Thus, plaintiffs attempt to distinguish the present case from *White*, *Reeves*, and *Alexandria Scrap* on the basis that the State is not acting as a buyer or seller in the charitable fund raising market.

The State defendants respond, first, that by implementing the 1993 amendments to Minn. Stat. § 309.501 the State is not acting as a market regulator but rather, as an employer, by limiting access to its workplace for the purpose of fund raising. They contend that the State, like any private employer, has the right to select the parties with whom it will deal. The State defendants rely on *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 216 n.4 (1st Cir. 1994), for the proposition that the "market participant" exception applies not only when a State enters the market as a buyer or seller, but also when it acts as an employer to favor local citizens. *Id.* We agree with the position of the State defendants.

By excluding from the Campaign those charitable federations that could not meet the local connection requirements of the 1993 amendments, the State is acting as an employer restricting access to its workplace. Although the State is participating in the charitable fund raising market, it is doing so as a proprietor allowing its employees to make charitable

contributions in the workplace. As such, the State may exercise discretion as to the charities permitted to solicit from state employees during working hours, in the same way that any private employer may limit the parties who conduct business with employees during the work day. Therefore, we reject plaintiffs' argument that the market participant exception does not apply to local and state governments acting as employers. We note that in *White*, 460 U.S. at 211 n.7, one factor influencing the Court's application of the market participant doctrine to the City of Boston's requirement that city residents comprise at least fifty percent of the work force of each firm awarded a public construction contract was the Court's observation that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.' " *Id.*

Moreover, the policies underlying the market participant exception also support its application to local and state governments acting as employers. As we explained above, this exception is founded on the notion that when a state enters the open market as a proprietor, rather than as a regulator, there is less danger that the state's activity will interfere with Congress's plenary power to regulate the market. *See, e.g. Reeves*, 447 U.S. at 437-39. We think this reasoning squarely envelops the situation where a State or local government acts as an employer, and we see no well-founded reason to constrict the proprietary activities covered by the market participant exception to acts of buying or selling. *Cf*: Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 627 (1993) (contending that the fundamental principle of the market-participant doctrine should be whether a State is acting in a manner that "could legally be undertaken by a private party").

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Our conclusion that the State is acting as a market participant, rather than as a market regulator, in implementing the 1993 amendments to Minn. Stat. § 309.501 is reinforced because the general regulation of charitable organizations is addressed elsewhere in Minn. Stat. Chs. 309 (Social and Charitable Organizations) and 317A (Nonprofit Corporations). By contrast, Minn. Stat. § 309.501 is directed solely towards defining the criteria that charitable federations must meet in order to qualify as RCCOs eligible to participate in the Campaign. Plaintiffs' arguments to the contrary are without merit.

Plaintiffs contend, however, that even if the State is held to be a participant in the charitable *solicitation* market, Commerce Clause scrutiny is "still warranted, because the State is impermissibly regulating outside this market in the "downstream" market of charitable *distribution*. In other words, plaintiffs maintain that the present case most closely resembles *Wunnicke*, 467 U.S. at 96, in which the Supreme Court rejected Alaska's invocation of the market participant doctrine. In *Wunnicke* Alaska had instituted a program of selling timber at a substantially reduced price from state-owned forests on the condition that buyers agree to process that timber at in-state facilities prior to export. *See id.* at 96-98. The Court held that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." *Id.* at 98. It reasoned:

> In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end

> the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

Id. at 96. Relying on *Wunnicke*, plaintiffs argue that the 1993 amendments to Minn. Stat. § 309.501 regulate "downstream," in the charitable distribution market, by requiring that each member charity supported by a RCCO "provid[e] all or substantially all of its health, welfare, social, or other human services, in the community and surrounding area in which the . . . [Campaign] takes place." Minn. Stat. § 309.501(1)(b)(8). We think plaintiffs' argument is misguided. Unlike the State of Alaska in *Wunnicke*, which acted as a seller of timber in the commercial market, the State of Minnesota in the present case is acting as an employer in the charitable fund raising market by restricting the charities that may solicit from state employees in the State workplace during business hours. In restricting charitable participation in the Campaign, the State has required that the member charities of each RCCO must provide all or substantially all of their services in the State. By establishing this requirement, the State is not performing a function separate from its role of an employer in restricting the charities which may solicit from State employees. Rather, in determining which charities may have access to its employees, the State is merely considering the regions where the charities will provide a substantial portion of their benefits. Thus, the present case is distinguishable from *Wunnicke*, in which Alaska, as a seller of timber, imposed requirements which were wholly unrelated to the purchase and sale of timber. *See Wunnicke*, 567 U.S. at 96-98.

Because we hold that the State is a market participant in the present case, the Commerce Clause presents no barrier to the 1993 amendments restricting the eligibility criteria for participation in the Campaign.[6] We therefore affirm the order of the district court concluding that the 1993 amendments to Minn. Stat. § 309.501 are exempt from scrutiny under the Commerce Clause.

III. CONCLUSION

For the foregoing reasons, we hold that the exclusion of non-local fund raisers from the Campaign does not violate plaintiffs' First Amendment right to free speech or their rights to equal protection and due process. We further hold that the State is a "market participant"; thus the 1993 amendments to Minn. Stat. § 309.501 are exempt from scrutiny under the Commerce Clause. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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6. Thus, we need not consider the impact that the 1993 regulations have on out-of-state charitable federations and affiliated agencies seeking to participate in the Campaign.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT OF MINNESOTA DATED DECEMBER 19, 1994

UNITED STATES DISTRICT COURT OF MINNESOTA

Case No. Civil 4-94-483

Independent Charities of America, et al,

v.

State of Minnesota, et al,

JUDGMENT IN A CIVIL CASE

* * *

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendants' motion for summary judgment is granted.

DATE: December 19, 1994

FRANCIS E. DOSAL, CLERK

s/ Julie Rustad
Julie Rustad, Deputy Clerk

APPENDIX E—EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 16, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-94-483

Independent Charities of America, Inc., et al.,

Plaintiffs,

-v-

State of Minnesota, et al.,

Defendants.

CROSS MOTIONS FOR SUMMARY JUDGMENT

December 16, 1994

PARTIAL TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE

JAMES M. ROSENBAUM

Minneapolis, Minnesota

APPEARANCES:

For the Plaintiff Todd J. Zerin

For the Defendant John Garry

Appendix E

[Commencing at page 19]

THE COURT: All right. Thank you. The matter is before the Court on cross motions for summary judgment.

The defendant's motion for summary judgment will be granted. That motion sought by the plaintiff will be denied. In this case, the plaintiffs are four federations of charitable organizations which are tax exempt, as defined by the Internal Revenue Code at Section 503(c)(3). The defendants are the state of Minnesota and one of its officers, Bruce Johnson, apparently the acting commissioner of the Department of Employee Relations.

Jurisdiction is claimed to be premised on 28 United States Code 1331 and 1343(3). It's the plaintiffs' claim that Minnesota statute 309.501 is unconstitutional, and violates their rights under the First, the Fifth, and the Fourteenth Amendments to the United States Constitution. Plaintiffs further argue that the statute discriminates against them and burdens interstate commerce in violation of the commerce clause of the Constitution.

For an understanding of the plaintiffs' claims, the Court briefly sets forth the following information. It's the plaintiffs' wish to participate in the annual Minnesota State Employees Combined Charitable Campaign, which the Court will conveniently shorten to the term the Campaign. This Campaign is a fund drive which is conducted in the state workplace during working hours. Charitable [20] contributions from state employees are made through payroll deductions. The plaintiffs are barred from participation in the 1994 and 1995 Campaign because in 1993 and 1994, the Minnesota legislature enacted

statutory amendments to define charitable organizations in a fashion which ultimately would exclude them.

By statute, only those organizations recognized as registered combined charitable organizations, which sounds enough like RCCO to make me nervous about using the expression, but when I say RCCO it's R-C-C-O, as defined under the statute at 309.521. Those are the only organizations which may participate in the Campaign. See Act of May 14, 1993, Chapter 192 at Section 86, 1993, Minnesota Laws at 711, 766 and 69. Now in 1993 Minnesota's legislature enacted local requirements for participation in the Campaign which includes RCCO's, one, must have a local board of directors; two, such RCCO's must distribute 70 percent of funds contributed by state employees to affiliated agencies incorporated or headquartered in Minnesota; and three, a RCCO's affiliated agency must provide all or substantially all of its services to the local community. The plaintiffs were permitted on a sort of a grandfather basis to participate in the 1993/'94 Campaign because the 1993 amendments had a one year waiver provision.

[21] Now, in 1994, the legislature again amended the definition of eligible RCCO's, as set forth in Minnesota Statutes 309.501, subdivision 1 (b)(4). Participation here was permitted if the RCCO was governed by a local board of directors or a national board of directors, which has a local advisory board, which is comprised of people who live or work in the community, if the charitable organization is solely an educational institution. And second, eligible RCCO's would be charitable organizations organized in Minnesota by Minnesota state employees which grant funds to nonprofit agencies which provide Minnesota residents with food or shelter. Here I reference the Act of April 26, 1994, Chapter 535, Section 1, 1994, Minnesota Laws 523.

Appendix E

These 1994 amendments were clearly directly focused on the United Negro College Fund and an entity entitled Open Your Heart to the Hungry and Homeless, and permitted those organizations to participate in the upcoming 1994/'95 campaign, which it's the Court's understanding has actually been conducted at this point. It is the plaintiffs' contention that these 1994 amendments were drafted solely to afford preferential treatment to those two charitable organizations. That may in fact be true. It is not germane, however, to the Court's determinations, as I will set forth in a moment.

It's a matter of small but historic interest, the [22] plaintiffs filed a complaint in June 2, 1994, and filed a motion for preliminary injunction shortly thereafter. This Court referred the preliminary injunction motion to the United States Magistrate Judge Franklin J — Franklin L. Noel for his report and recommendation. On July 29, 1994, he did recommend that the plaintiffs' motion for preliminary injunction be denied, ah, suggesting that this was unlikely the plaintiffs might succeed on the merits. This Court on November 30, 1994, adopted the report and recommendation, ah, and denied a motion for preliminary injunction, and as I've indicated, each party is before the Court, seeking summary judgment.

Summary judgment is appropriate when there's no genuine issue as to a material fact, of course, and the moving party is entitled to judgment as a matter of law under the Federal Rules of Civil Procedure 56(c) as elucidated by *Celotex versus Catrett* at 477 U.S. 317 at 322 and 23; *Anderson versus Liberty Lobby*, its companion at the same volume, 242, both 1986.

Here, the Court first considers the plaintiffs' claim that the 1993 amendments unreasonably restrict their free speech rights.

Appendix E

It is the Court's determination that plaintiffs' First Amendment claim is foreclosed by *Cornelius versus NAACP Legal Defense and Education Fund,* at 473 U.S. 788 1985. In Cornelius,a number of political [23] organizations were excluded-from a combined federal campaign, the CFC, and that is a charity drive somewhat analogous, but directed particularly at federal employees. It's outline is set forth in the case. The Cornelius plaintiffs claim that their First Amendment rights have been violated because they were not allowed to participate in the CFC. The Supreme Court observed that charitable solicitation is protected speech. In fact it is. But control over access to a nonpublic forum in that case the federal, and here the state workplace, can be based on subject matter and speaker identity as long as the restrictions are reasonable and viewpoint neutral, cite the opinion at 806.

Here the state workplace, in this Court's view, is a nonpublic forum, therefore the restrictions need only be reasonable. The legislature history of the amendments reflect that they were intended to simplify the Campaign, make it operate more smoothly because the Campaign previously had suffered certain managerial problems. On this basis the Court can find that the plaintiffs' First Amendment claim fails as a matter of law and the defendants' motion for summary judgment is permitted to be granted, and is .

Secondly, the Court considers the plaintiffs' claim that the 1993/'94 amendments and '94 amendments violate the equal [24] protection and the due process claim, and due process clause. These claims too must fail. In the Court's view there is a rational relationship between the state's legitimate goals of keeping the campaign manageable and the means which they have chosen, in this case certain limitations. The plaintiffs agree

that this Court should apply the rational basis standard to review the amendments. Here I reference their own memorandum in support of their motion at page 7.

The Court finds that the plaintiffs are unable to meet their burden, that the amendments will not serve to minimize a disruption in the workplace and make the Campaign more manageable. This Court is not called upon to determine the necessary wisdom, merely the rationality of the state's actions of which the Court is not constituted, as is set forth in case law as a super legislature, and it is not for this Court to determine whether the legislature acted wisely, but whether it was reasonable. This Court is convinced that the amendments are rationally related to the legitimate government objectives set forth.

The Court further notes again that the United States Supreme Court has stated that a rejected First Amendment claim, which is in fact what we have here, which is then couched in equal protection language, it does not then take on a new coloring. *See Perry Educational Association versus* [25] *Perry Local Educators Association,* 460 U.S. 37 at 54. The plaintiffs' (sic) motion for summary judgment is granted on due process and equal protection grounds both.

Next, the Court considers the plaintiffs' claim that the 1993 amendment violates the commerce clause. That clause would prohibit a state from unjustifiably discriminating against or burdening interstate commerce, citing *Oregon Waste versus Department of Environmental Quality,* 114 Supreme Court 1345 at 1349, 1994. But if the state is acting as a market participant rather than a state regular, then the commerce clause would not limit the state's activities. Cite *South-Central Timber Development Inc. v. Wunnicke,* 467 U.S. 82 at 93, 1984. Now, the

commerce clause is intended to apply to state taxes and regulations, generally not to states acting as market participants, citing *Reeves versus Stake*, 447 U.S. 429 at 436, 437, 1980.

Here the Court determines that the state is acting as an employer and not as a regulator by defining the charitable organizations which have access to its workplace and its employees for the purpose of their fund raising. The state is not regulating the charitable organizations. That function may be permitted or may be performed in other statutes, referencing only for purposes of review state —Minnesota Statutes 309 and 317A. But the state is providing [26] here its employees with a means and mechanism for making charitable contributions and making them available as an employer to organizations which might solicit funds. This is a classic employer function. The commerce clause proscriptions then do not apply, and the defendants' motion for summary judgment on that claim is granted.

For the reasons set forth, the defendants' motion for summary judgment is and will be granted, the plaintiffs' is dismissed with prejudice. And that'll be the order of the Court. Thank you, counsel.

CERTIFIED BY: Dawn M. Sampson

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT OF MINNESOTA FOURTH DIVISION DATED DECEMBER 16, 1994

UNITED STATES DISTRICT COURT OF MINNESOTA
FOURTH DIVISION
4-94-CV-483

Independent Charities of America, et al,

v.

State of Minnesota, et al,

ORDER

This matter is before the Court on cross motions for summary judgment, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. The Court heard oral argument on December 16, 1994. For the reasons set fourth at the hearing, and based on the files, records, and proceedings herein, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendants' motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 16, 1994

s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX G — LETTER FROM KEN ZASROW TO RUSTY MAY DATED JUNE 28, 1994

SAINT PAUL

BUSINESS AND FINANCIAL AFFAIRS PUBLIC SCHOOLS LIFELONG LEARNING

DISTRICT 625 - 360 COLBORNE STREET- SAINT PAUL, MINNESOTA 55102-3299 - (612) 228-3662 FAX #(612) 293-6207

June 28, 1994

Rusty May
Director
Local Independent Charities
1111 Oak St.
San Francisco, CA 94117

Dear Rusty:

Your organization has been approved to participate in a single, unified fund raising campaign in the St. Paul Schools for the 1994-95 school year, contingent upon approval by the State Department of Employee Relations.

CAMPAIGN PROCEDURES

Each duly registered and approved combined charitable organization soliciting collections from staff members in the St. Paul schools:

a) Shall participate in a single, unified fund raising campaign in the St. Paul schools once each school year on such dates as designated by the Board of

Appendix G

Education upon recommendation of the Superintendent.

b) Shall conduct its annual fund raising campaign in the St. Paul schools in accordance with procedures established by the Superintendent.

c) Shall not, directly or indirectly, coarce any staff member to contribute to its annual fund raising campaign.

d) Shall not distribute to any other person or entity for fund raising purposes the names of staff members making or not making contributions to its annual fund raising campaign in the St. Paul schools.

e) May utilize bi-weekly payroll deduction if the Payroll Department receives the written request of the contributing staff members.

1) Each staff member requesting payroll deduction shall be considered to consent to such deduction and to the transmission of the amount so deducted to the designated combined charitable organization.

2) The Payroll Department shall retain the amounts so deducted and shall transmit the sum total of the deductions to the accounts of the contributing staff members. Such transmission shall be considered as payments to the contributing staff members of the amounts so transmitted. Payroll deduction shall not be

considered as an assignment to the designated combined charitable organization of any interest in the monies so deducted other than as agent of the contributing staff members.

3) The School District shall not be liable to the designated combined charitable organization or to any contributing staff member for any failure to make a proper deduction or transmittal of the amounts designated for payroll deduction.

SOLICITATION OF STUDENTS

Students shall not be solicited for charitable contributions by any outside agency.

REQUIREMENTS FOR INCLUSION IN FUTURE UNIFIED DRIVES

On or before May 1 of every year each combined charitable organization desiring to solicit collections from staff members in the St. Paul schools shall file a letter of application with, and on a form provided by, the Executive Director, Business and Financial Affairs, accompanied by a true and correct copy of its most recent annual report filed by it with the Office of the Attorney General pursuant to Minnesota Statutes Section 309.53, as amended and a copy of the letter indicating acceptance by the State Department of Employee Relations.

Any registered combined charitable organization failing to obtain a contribution commitment from a minimum of five percent of the total number of staff contributing in a single

unified fundraising campaign will be excluded from the following year's campaign. Such excluded organization may reapply for participation after the one year of exclusion.

Sincerely,

s/ Ken Zastrow
Ken Zastrow
Executive Director, Business and Financial Affairs

APPENDIX H — LIST OF MEMBER CHARITIES

Member Charities of Petitioner Federations (as contained in applications to 1994-1995 Campaign)

Independent Charities of America

9 to 5 Working Women Education Fund
Adoptive Families of America
AIDS Research Foundation
Airmen Memorial Foundation
American Humane Association
American Leprosy Missions International
Angel Planes/Children's Miracle Flights
ARROW/American Indian Charity
Asbestos Victims Special Fund Trust
Cancer Research Foundation of America
Compassionate Friends
Disabled American Veterans Charitable Service Trust
FACES: The National Association for the Craniofacially Handicapped
Feed The Children
Fellowship of Christian Athletes
Feminists for Life Education Project
Holt International Children's Services
Interchurch Medical Assistance
Leukemia Clinical Research Foundation
National Center for Lesbian Rights
National Court Appointed Special Advocates for Children Association (CASA)
National Immigration, Refugee, and Citizenship Forum
New Israel Fund
North American Council on Adoptable Children
Operation Smile Intemational

Paralyzed Veterans of America Spinal Cord Research Foundation
Paws With a Cause
Prison Fellowship Ministries
S.E.E. (Surgical Eye Expeditions) International
Second Harvest
Toys for Tots Foundation (Marine Corps Reserve)
World Vision Relief and Development

Local Independent Charities

AMICUS, Inc.
BLIND, Inc.
Camp Friendship, Inc.
Catholic Eldercare
Center for Victims of Torture
Child's Play Theatre Company
Hammer Residences, Inc.
Grooves Learning Center
Little Brothers - Friends of the Elderly
Minnesota Advocates for Human Rights
Minnesota Association of Guardian Ad Litems, Inc. (MAGAL)
Minnesota Literacy Council
Minnesota Special Olympics, Inc.
National Ataxia Foundation
Ronald McDonald House/Twin Cities
Twin Cities Tree Trust

America's Charities
(f/k/a NUSA)

American Foundation for the Blind
Amnesty International of the USA

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Caring Institute
Childhelp USA
Children's Heart Fund
Food for the Poor
Give Kids the World
"Just Say No" International
Make-A-Wish Foundation of America
Martin Luther King, Jr. Center for Nonviolent Social Change
Multiple Sclerosis Association of America
NAACP Legal Defense and Educational Fund
NAACP Special Contribution Fund
National Abortion and Reproductive Rights Action League Foundation
National Association for Visually Handicapped
National Black Child Development Institute
National Center for Missing and Exploited Children
National Committee to Prevent Child Abuse
National Community AIDS Partnership
National Recreation & Park Association
National Right to Life Educational Trust Fund
Native American Rights Fund
Orphan Foundation of America
Vietnam Veterans of America
Zero Population Growth Foundation

Environmental Federation of America (Earth Share)

African Wildlife Foundation
American Farmiand Trust
American Forests
American Rivers
Center for Marine Conservation

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Defenders of Wildlife
Environmental Defense Fund
Environmental Law Institute
Friends of the Earth
INFORM
Izaak Walton League of America
National Coalition Against the Misuse of Pesticides
National Wildlife Federation
Natural Resources Defense Council
Pesticide Action Network
Rainforest Alliance
Safe Energy Communication Council
Sierra Club Foundation
Sierra Club Legal Defense Fund
Union of Concerned Scientists
The Wilderness Society
World Resources Institute
World Wildlife Fund

Supreme Court, U.S.
FILED
OCT 17 1996
CLERK

No. 96-414

In The

Supreme Court of the United States

October Term, 1996

INDEPENDENT CHARITIES OF AMERICA, INC., et al.,

Petitioners,

vs.

STATE OF MINNESOTA, WAYNE SIMONEAU, in his capacity as Minnesota Commissioner of Employee Relations,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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22 pp

QUESTION PRESENTED

Is a state subject to dormant Commerce Clause scrutiny as a market regulator when it acts as an employer to limit access to its workplace for charitable fundraising in the same way any private employer could?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. That opinion (Pet. App. 4a-23a) is reported at 82 F.3d 791. The opinion of the district court (Pet. App. 25a-31a) was given orally and is unreported.

STATEMENT OF THE CASE

This case concerns the constitutional challenge of Petitioners, four charitable federations, to certain 1993 amendments to Minn. Stat. § 309.501, the statute that governs the Minnesota State Employees Combined Charitable Campaign ("campaign"). This is "the annual state campaign whereby a state employee may designate that the employee's contribution to a registered combined charitable organization may be deducted from the pay of the employee for each pay period." Minn. Stat. § 309.501, subd. 1(e) (1994). The campaign is conducted in the state workplace during working hours.

Registered combined charitable organizations ("RCCOs") are funding federations of affiliated charities. Before the challenged amendments, Minn. Stat. § 309.501, subd. 1 (1992), defined an RCCO as:

> an organization
>
> (1) which is tax exempt under section 501(c)3 of the Internal Revenue Code . . . and to which contributions are deductible under section 170 of the Internal Revenue Code;

(2) which secures funds for distribution to ten or more charitable agencies in a single, annual consolidated effort;

(3) which is governed by a voluntary board of directors which represents the broad interests of the public;

(4) which distributes at least 70 percent of its total campaign income and revenue to the designated agencies it supports and expends no more than 30 percent of its total income and revenue for management and general costs and fund raising costs;

(5) and each designated agency supported by the recipient institution devotes substantially all of its activities directly to providing health, welfare, social, or other human services to individuals;

(6) and each designated agency supported by the recipient institution provides health, welfare, social, or other human services, in the community and surrounding area in which the recipient institution's fund drive takes place; and

(7) which has been registered with the commissioner of commerce in accordance with this section.

Petitioners met this definition of RCCOs and participated in the 1992-93 campaign.

During the 1993 session, the Minnesota legislature amended the statutory definition of RCCOs, providing more restrictive criteria for participation in the campaign. Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711,

766-69. Three of the 1993 amendments are challenged by Petitioners.

First, the legislature created a new requirement that RCCOs have local boards of directors. Section 309.501 was amended to require participating RCCOs to be governed by a "local, independent" board of directors, ninety percent of whom "live or work in the community or surrounding area." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(4) (1994 & Supp. 1995). Petitioners did not have local boards of directors and thus did not qualify as RCCOs under the 1993 amendments.

Second, the legislature changed the statute to require that seventy percent of the income distributed by an RCCO to its affiliated agencies go to affiliated agencies "that are incorporated in Minnesota or headquartered in the service area in which the [campaign] takes place." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(6) (1994 & Supp. 1995). Petitioners did not qualify under this amendment.

Third, the legislature created more stringent local involvement requirements for the affiliated agencies of an RCCO. Specifically, the legislature required each affiliated agency of an RCCO to provide "all or substantially all of its" services (as opposed to some of its services) "in the community and surrounding area in which the [campaign] takes place." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(8) (1994 & Supp. 1995). Petitioners Earth Share and Local Independent Charities, Inc., met

this requirement but Petitioner Independent Charities of America, Inc., did not. It is not clear from the record whether Petitioner National United Service Agencies, Inc., met this requirement.

The legislature also provided a compliance waiver of one year for those RCCOs that participated in the 1992-93 campaign but would be ineligible under the amended criteria for participation in the 1993-94 campaign. Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 770. Consequently, each of the Petitioners participated in the 1993-94 campaign.

The purposes of these 1993 amendments were to simplify the campaign, make it operate more smoothly, and reduce disruption in the state workplace. Pet. App. 13a-14a. They impose no restrictions on the rights of Petitioners or other charitable federations to solicit donations from state employees outside the workplace or to participate in other employers' fund drives. Nor do they otherwise place any restrictions on Petitioners' general ability to solicit donations in Minnesota. *Id.* at 14a. The regulation of charitable fundraising in the state is accomplished by other statutes. *Id.* at 21a; *see generally* Minn. Stat. ch. 309 (1994 & Supp. 1995) (Social and Charitable Organizations), ch. 317A (1994 & Supp. 1995) (Nonprofit Corporations).

On June 2, 1994, Petitioners commenced this lawsuit challenging the constitutionality of these 1993 amendments and certain 1994 amendments to section 309.501. Their amended complaint alleged that the challenged amendments violate the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth

Amendment, and the dormant Commerce Clause. Petitioners sought a declaratory judgment and permanent injunction against application of the statutory amendments.

Petitioners moved for a preliminary injunction to prohibit the 1994-95 campaign from going forward without their participation. In a report and recommendation filed August 1, 1994, the magistrate judge concluded that Petitioners were unlikely to succeed on the merits of any of their claims and recommended the motion be denied. The district court adopted the report and recommendation and denied Petitioners' motion for a preliminary injunction.

The parties agreed there were no genuine issues of material fact, only questions of law, and filed cross-motions for summary judgment. The district court heard the motions on December 16, 1994 and granted summary judgment against Petitioners on each of their claims.

As to the dormant Commerce Clause claim, the district court concluded it was foreclosed by the market-participant doctrine because "the state is acting as an employer and not as a regulator by defining the charitable organizations which have access to its workplace and its employees for the purpose of their fund raising." Pet. App. 31a. The district court described this as "a classic employer function." *Id.*

On April 29, 1996, the Eighth Circuit Court of Appeals affirmed the district court in a unanimous

opinion as to each of Petitioners' claims.[1] The court held that under the market-participant doctrine, the challenged 1993 amendments are not subject to dormant Commerce Clause scrutiny. The court began by recognizing that the dormant Commerce Clause is directed at state regulatory measures, not state proprietary activities. Pet. App. 17a-18a. The court then reasoned that:

> [T]he State is not acting as a market regulator but rather, as an employer, by limiting access to its workplace for the purpose of fund raising. . . . Although the State is participating in the charitable fund raising market, it is doing so as a proprietor allowing its employees to make charitable contributions in the workplace. As such, the State may exercise discretion as to the charities permitted to solicit from state employees during working hours, in the same way that any private employer may limit the parties who conduct business with employees during the work day. Therefore, we reject [Petitioners'] argument that the market participant exception does not apply to local and state governments acting as employers.

Id. at 19a-20a. In view of the principles guiding the doctrine, the court likewise saw "no well-founded reason to constrict the proprietary activities covered by the market

---

[1] The court held first that the challenged 1993 and 1994 amendments to section 309.501 do not violate the First Amendment, equal protection or substantive due process because the restrictions on access to the state workplace for charitable fundraising are clearly reasonable. Pet. App. 13a-16a. Petitioners are no longer pursuing these claims.

participant exception to acts of buying or selling." *Id.* at 20a.

The court also rejected Petitioners' additional argument that dormant Commerce Clause scrutiny is nevertheless warranted because the state is regulating "downstream" in the charitable distribution market by requiring that the member charities of each RCCO provide all or substantially all of their services in the state. Pet. App. 21a-22a. The court held that "[b]y establishing this requirement, the State is not performing a function separate from its role of an employer in restricting the charities which may solicit from State employees" in the state workplace during business hours. *Id.* at 22a.[2]

On June 11, 1996, the Eighth Circuit denied a petition for rehearing and suggestion for rehearing en banc. That petition, like the present petition for certiorari, was limited to Petitioners' contention that the market-participant doctrine cannot exempt a state from dormant Commerce Clause scrutiny unless the state is acting as a buyer or seller.

---

[2] Petitioners have apparently abandoned this "downstream" regulation claim, as the petition is limited to their threshold contention that the market-participant doctrine cannot apply here because the state is not a buyer or seller.

REASONS FOR DENYING THE PETITION

There is no sound reason for the Court to grant review in this case, let alone the requisite "compelling reasons." Sup. Ct. R. 10. The decision of the court of appeals is consistent with the principles guiding the relevant decisions of this Court and is not in conflict with any decision of another court of appeals. Nor is there any ground for delaying a determination on the petition pending this Court's disposition of *Camps Newfound/ Owatonna, Inc. v. Town of Harrison,* No. 94-1988, since that case presents a different Commerce Clause question.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE GUIDING PRINCIPLES OF THE MARKET-PARTICIPANT DOCTRINE IDENTIFIED IN THIS COURT'S DECISIONS.

Petitioners contend that review should be granted in this case on the ground that the Eighth Circuit's decision conflicts with this Court's cases on the market-participant doctrine. Because those cases have applied the doctrine only in factual contexts where the state was buying or selling something, Petitioners view them as implicitly requiring that the doctrine cannot apply unless the state is a buyer or seller, with a concomitant presence of state funding. Petitioners' position mistakenly elevates the particular factual circumstances of the Court's precedents to a constitutional rule. In so doing, it ignores the guiding principles of the market-participant doctrine identified by this Court, which teach that the dormant Commerce Clause applies only to state governmental actions regulating interstate commerce and not to state proprietary

actions analogous to those of private parties. The Eighth Circuit correctly rejected Petitioners' position in concluding that these principles are equally in force when the state acts in its proprietary capacity as employer to limit access to its workplace as when it acts in that capacity to buy or sell goods and services.

As the Eighth Circuit recognized, the starting point of this Court's precedents is the principle that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis in original); *see also United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) ("The Commerce Clause acts as an implied restraint upon state regulatory powers."). From this it follows that the market-participant exemption exists because the dormant Commerce Clause only withholds from the states the power to regulate interstate commerce and therefore does not reach other state actions even if they may affect interstate commerce. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803-10 (1976). Thus, the relevant inquiry is not whether the state is buying or selling something, but whether it is acting as a governmental regulator of the market.

The Eighth Circuit also correctly recognized, and Petitioners do not dispute, Pet. at 14-15, that the state is not a market regulator subject to dormant Commerce Clause scrutiny when it engages in proprietary activity. As this Court reiterated in its unanimous opinion in *New Energy*, which held the market-participant doctrine

inapplicable to a tax credit scheme, state proprietary activity that is analogous to that of a private actor is not regulatory and therefore is exempt from dormant Commerce Clause scrutiny under the doctrine. 486 U.S. at 277-78. Only when the state is "acting in it distinctive governmental capacity" is it subject to the restrictions of the dormant Commerce Clause. *Id.* at 277.

This principle encompasses the state's actions in its proprietary capacity as employer, as is evident from *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). There the Court held dormant Commerce Clause scrutiny did not apply to a city rule requiring that at least half the work force of each firm performing city-funded construction be city residents. *Id.* at 205-11; *see also United Bldg.*, 465 U.S. at 219 (emphasizing that the crucial element underlying the *White* decision was the fact that the affected employees were "working for the city").

However, Petitioners wrongly posit that, even when the state acts in its role as an employer rather than as government regulator, it is subject to dormant Commerce Clause scrutiny unless it fits the buyer/seller mold – in this instance as a buyer of labor. If the dormant Commerce Clause does not restrict the hiring practices of the state as employer, there is no principled basis for concluding otherwise when the state is limiting access to its employees at the workplace during business hours.

No court has overtly embraced the buyer/seller straightjacket that Petitioners would impose on the market-participant doctrine. Nor should the doctrine be construed so narrowly simply by virtue of the fact that courts

have had occasion to address the doctrine primarily in the context of a state buying or selling goods and services. That there have not been more occasions for courts to address the doctrine in contexts such as that presented here merely reflects the novelty and weakness of claims that the dormant Commerce Clause restricts state proprietary activities on state property. *See, e.g., County of Westchester v. Town of Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990) (summarily rejecting claim that dormant Commerce Clause restrictions applied to government "growing trees on its property" because the purported interference with commerce was "caused by property owners acting in a proprietary fashion").

In view of these guiding principles, the Eighth Circuit's dormant Commerce Clause holding in this case is clearly consistent with this Court's decisions. The state workplace, "like any place of employment, exists to accomplish the business of the employer." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 805 (1985). Given this function, the state necessarily has wide discretion in maintaining control over access to its workplace, in the same way private employers do with respect to private workplaces. *Id.* at 805-06; *see also id.* at 800 (stressing that government, "'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated'") (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). The exercise of this discretion is no more the state acting in its distinctive governmental capacity than is the state's hiring of employees or its purchase or sale of goods and services. It is every bit as much proprietary as the state's hiring, buying or selling activities. Thus, there

is simply no good reason, certainly none put forward by Petitioners, why the state should somehow be considered a market regulator subject to dormant Commerce Clause scrutiny when it acts no differently than a private employer by controlling access to its workplace for charitable fundraising, any more than when the state acts in its proprietary capacity to hire, buy or sell.

In sum, Petitioners have given this Court no sound reason for granting review of the Eighth Circuit's decision on the basis of a conflict with this Court's decisions on the market-participant doctrine.

II. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *SMITH V. DEPARTMENT OF AGRICULTURE* OR ANY OTHER DECISION OF ANOTHER COURT OF APPEALS.

A "principal purpose" for which this Court uses its certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). "The negative implication of this ground, borne out time and again in [this Court's] decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of [this Court's] precedents – even one deemed to be arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals." *Hubbard v. United States*, ___ U.S. ___, ___, 115 S. Ct. 1754, 1767 (1995) (Rehnquist, C.J., joined by O'Connor and Souter, JJ., dissenting on other grounds). Because no such conflict exists here, the Court should deny review.

Respondents have not found any decision of another court of appeals holding or even suggesting that the proprietary activities of a state acting as an employer, in the same way any private employer could, are not exempt from dormant Commerce Clause scrutiny. Indeed, with respect to viewpoint-neutral restrictions on access to the government workplace for charitable fundraising, prior federal court decisions have, like the Eighth Circuit's here, uniformly rejected challenges made on other constitutional grounds. *See Cornelius*, 473 U.S. 788 (rejecting First Amendment challenge to such restrictions on access to federal government workplace); *Pilsen Neighbors Community Council v. Netsch*, 960 F.2d 676 (7th Cir. 1992) (rejecting First Amendment and equal protection challenges to such restrictions on access to state government workplace); *United Black Community Fund, Inc. v. City of St. Louis*, 800 F.2d 758 (8th Cir. 1986) (rejecting First Amendment challenge to such restrictions on access to city government workplace).

Petitioners argue that there is one conflicting court of appeals Commerce Clause decision, *Smith v. Department of Agric.*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). The majority opinion in that case held that a farmers produce market established by Georgia on property it owned and operated was not covered by the market-participant doctrine and, consequently, the restrictions of the dormant Commerce Clause applied to the Georgia Department of Agriculture's regulations on access to the produce market. *Id.* at 1082-83. That decision does not present a conflict that warrants this Court's review.

The *Smith* majority opinion does not conflict with the Eighth Circuit's decision for the simple reason that Minnesota has not created a new market for charitable fundraising as Georgia did for produce. The state workplace was not established for the purpose of charitable fundraising. Rather, the state workplace, "like any place of employment, exists to accomplish the business of the employer." *Cornelius*, 473 U.S. at 805. By allowing its employees to make charitable contributions in the workplace during business hours, and limiting access to the workplace for this purpose, the state as employer does not thereby create a new market for charitable fundraising. It is simply acting toward its employees in the same proprietary capacity that private employers do toward their employees.

Nor is the state workplace even remotely analogous to certain types of government property, such as highways, which are constructed specifically to serve as an artery of commerce. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 450-51 (1989) (discussing road-use cases). Indeed, Petitioners themselves recognize that the most sensible explanation for the result in *Smith* is that the produce market was created for the very purpose of serving as an artery of commerce, and therefore limiting access to it was akin to limiting access to state roads. Pet. at 12. Limiting access to the infrastructure of interstate trade is hardly comparable to limiting the access of fundraisers to government employees in their workplace during business hours.

Finally, the reasoning of the *Smith* majority opinion has been criticized as aberrational. *See Smith*, 630 F.2d at

1086-88 (Randall, J., dissenting); Coenen, *supra*, at 451 & n.334. The case has hardly been viewed as vibrant authority given that it has never been cited by any court of appeals, including the Fifth and Eleventh Circuits themselves, and has not been cited in any reported federal or state court decision since 1987, notwithstanding the numerous market-participant doctrine cases decided during this time. Accordingly, even if the decisions were viewed as inconsistent in some measure, there is no need for this Court to grant review to reconcile those differences.

In short, Petitioners have not identified any decision of another court of appeals that stands in conflict with the Eighth Circuit's holding that a state is not subject to dormant Commerce Clause scrutiny when it acts as an employer to limit access to its workplace for charitable fundraising in the same way any private employer could.

III. A DETERMINATION ON THE PETITION SHOULD NOT BE DELAYED TO AWAIT THIS COURT'S DECISION IN *CAMPS NEWFOUND/ OWATONNA, INC. V. TOWN OF HARRISON.*

The Court should decline Petitioners' request to delay action on their petition until after it decides *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, No. 94-1988, which was argued on October 9, 1996. This request is based on Petitioners' unfounded prediction that in deciding *Camps Newfound*, the Court could effectively establish state funding as an absolute requirement of the market-participant doctrine, and thereby preclude its application here. Pet. at 7, 16.

The question accepted for review in *Camps Newfound* is whether a Maine tax statute violates the Commerce Clause because it deprives charitable nonprofit institutions of otherwise available property tax exemptions if they are conducted or operated principally for the benefit of non-residents. Petitioner's Brief, No. 94-1988 (statement of question presented). The state court decision being reviewed makes no mention of the market-participant doctrine, *see* 655 A.2d 876 (Me. 1995), and the briefs to this Court address the doctrine only by analogy and in a secondary and cursory fashion, *see* Respondent's Brief at 34-37; Petitioner's Reply Brief at 14-15.

Thus, the question on review in *Camps Newfound* has no connection to the question presented here other than in the general sense that both arise under the dormant Commerce Clause. Unlike here, the state action at issue in *Camps Newfound* is distinctively governmental, not proprietary. This is made clear by *New Energy*, in which this Court held unanimously that the market-participant doctrine had no application to a state's "assessment and computation of taxes" because that is "a primeval governmental activity," not a proprietary activity analogous to the actions of a private actor. 486 U.S. at 277-78. It is highly unlikely then that in deciding *Camps Newfound* the Court will address application of the market-participant doctrine to state proprietary activity, let alone determine whether its application to that activity is contingent on state funding, as Petitioners suggest.

Accordingly, there is no reason to delay determination on the petition because the disposition of *Camps Newfound* cannot be expected to place the Eighth Circuit in conflict with this Court on the question whether a state

is exempt from dormant Commerce Clause scrutiny when it acts in its proprietary capacity as an employer to limit access to its workplace for charitable fundraising.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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